

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,

Plaintiffs,

v.

United States of America,

Plaintiff-Intervenor,

v.

Anita Lohr, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

CV 74-90 TUC DCB
(Lead Case)

Maria Mendoza, et al.,

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District No. One, et al.,

Defendants.

CV 74-204 TUC DCB
(Consolidated Case)

**NOTICE OF FILING BY SPECIAL MASTER OF REPORT
AND RECOMMENDATIONS RELATING TO DIETZ NARA**

The Special Master hereby respectfully submits the attached Report and Recommendations relating to the Dietz NARA and recommends Court approval of the District's proposal.

On May 9, 2015 TUSD submitted a proposal to the Court to approve the location of two portable classroom buildings on the Dietz K-8 campus to be used beginning in August 2015 (*see* Exhibit A). Both the Fisher and the Mendoza Plaintiffs oppose the District's Dietz proposal. The Department of Justice has no objection. For the reasons set forth herein, including the undisputed fact that the introduction of portables at Dietz will have no effect on the racial composition of the school or of any other school, the Special Master recommends that the Court approve the District's proposal.

Procedural History

On April 14, 2015, the District administration submitted to the Governing Board a proposal for locating portable buildings on the Dietz campus, and the Board then approved the proposal. On May 1, the District submitted this proposal to the Plaintiffs and the Special Master along with the required Desegregation Impact Analysis and requested approval in order to avoid burdening the Court with a contested Notice and Request for Approval (NARA) (Exhibit B). On May 15, the Mendoza Plaintiffs expressed their objections (Exhibit C) as did the Fisher Plaintiffs expressed their objections (Exhibit D). Also on May 15, the Department of Justice indicated that it had no objection to the District's proposal (Exhibit E).

On May 17, the Special Master sent a memo to the parties indicating what his response to the proposal and the objections would be if he were to submit a Report and Recommendation to the Court on this matter (Exhibit F). The Special Master asked the Fisher and Mendoza Plaintiffs to examine his conclusions and decide whether they wished him to proceed with an R&R.

Neither set of Plaintiff responded. On May 22, the District submitted the NARA to the Court (Exhibit G).

Analysis of Objections

Fisher Objections

The Fisher Plaintiffs raise four objections to placing portables at Dietz. The Special Master's response to each of these objections is as follow:

1. The Fisher Plaintiffs claim that the District's assertion that the student population will increase at Dietz is incorrect. In fact, the District makes no such assertion. Rather, it asserts that the population at Dietz has already increased beyond predictions and explains why this occurred. This increase in the student population, and in particular among students with special needs, is one of the justifications for the proposed portables.
2. The Fisher Plaintiffs argue that the court order relating to school closures February 2013, which limited the use of portables in receiving schools, applies to the Dietz portables. However, no students from closed schools still attend Dietz, and no student will be learning in Dietz portables for any extended period of time during the school day (*see* Exhibit A, p.5, Section 3a).
3. The Fisher Plaintiffs claim that the land mass at Dietz is inadequate to support portables and link this claim to an assertion that middle school students at Dietz are receiving an inferior education. No evidence is provided to support this claim (although Dietz is a C school) or to suggest that the introduction of portables would make things worse. One of the reasons given for adding the portables is to increase student access to a broader curriculum and to provide enrichment activities intended to increase student performance.

4. The Fisher Plaintiffs argue that inadequate attention was given to the District-wide impact of placing portables at Dietz. A related argument is made by the Mendoza plaintiffs and is addressed below. The educational opportunities that will be offered or facilitated by the addition of the portables at Dietz do not appear to be unique – similar programs are available at a number of other schools.

Mendoza Objections

A primary concern of the Mendoza Plaintiffs is that the introduction of CORE enrichment courses that will be offered in the portables should be offered throughout the District and, in particular, should be available in West Side schools. This concern was based, at least to some extent, on misinformation initially provided by the District. In the NARA submitted to the Court, the District corrects earlier information and indicates that the program at issue, which seeks to facilitate the transition of students from self-contained classrooms to classrooms that focus on particular subjects, exists at five West Side K-8 schools, one Central school, and one school on the East Side. This does not suggest that students in West Side schools are disadvantaged because some do not offer this program. Moreover, it is not clear that the program makes a substantial difference in student outcomes.

That there is variation in educational offerings across the District is not, in itself, evidence of discrimination or inequitable distribution of resources. Most school districts struggle with finding a balance between the need for common programs districtwide, especially with respect to core academic curricula, and the desirability of allowing for variation that is responsive to:

- differences in student needs
- the availability of community resources that support different opportunities
- unique capabilities of faculty
- traditions
- physical space and facilities
- experimenting with new ideas that might have district-wide usefulness.

1 Finding the right balance requires analyses that determine that the variation among schools does
2 not result in differences in educational opportunities and outcomes by race, ethnicity and
3 language facility. There is no reason to believe that the introduction of portables at Dietz would
4 have invidious consequences for Latino or African-American students elsewhere in the District.
5 And, 65% of the students at Dietz are Latino or African-American.
6

7 The Mendoza Plaintiffs also expressed concern that placing services that address the
8 needs of special education students in portables might stigmatize the students or provide them
9 with inadequate facilities. The District's counter-argument is that student privacy will be
10 enhanced as will space for developing Individual Educational Programs (IEPs) required by law,
11 teacher planning and family conferences, and this contention seems reasonable. The District also
12 points out that many students who are not special-education students will be using the portables.
13 Moreover, most of the instruction that special education students experience will be in regular
14 classrooms. In short, stigmatization is unlikely, and portables should allow for meeting the needs
15 of special education students more appropriately.
16

17 **Recommendation**

18 The Special Master recommends that the Court approve the District's request to install
19 two portables, each of which has two classroom sized spaces, at the Dietz K-8 School.
20

21 **Comment on the Need to improve the Consultation Process**

22 That this relatively minor matter – the installation of two portable classroom facilities that
23 will have no effect on integration – made its way to the Court and consumed many hours of time
24 by all the parties and the Special Master with the attendant costs is bleak testimony to the
25 continuing absence of trust and goodwill among the parties and the failure to develop a viable
26 process for approving actions by the District that are subject to the provisions of the USP.
27

28 On this matter and others, the Plaintiffs object to the District taking action without adequate prior

1 consultation. The District appears to believe that it must fully develop proposals (*see* Exhibit G,
2 p.4, lines 7-10) before consultation and that it is often desirable to get approval of the Governing
3 Board for such consultation, as is the case in the Dietz issue. And in some cases, the District
4 engages in what can only be seen as preliminary implementation, as in the matter of the
5 Fructhender/Sabino restructuring that was recently before the Court.
6

7 It seems likely that the District considers consultation with the Plaintiffs and the Special
8 Master a burden, one that impedes its responsibility to get on with the complex task of meeting
9 the needs of its students. The District identifies what it believes to be good ideas and wants,
10 understandably, to implement them expeditiously.

11 Even though the USP does not require consultation prior to the District's submission of a
12 proposal to the Governing Board, such submissions suggests that the District does not see
13 consultation as productive in shaping its proposals and further does not believe that the Board
14 should be considering the positions of the Plaintiffs or the Special Master when it makes its
15 decisions. When the District moves forward in developing a proposal without consultation, not
16 only does it deny itself the benefit of input from the Plaintiffs and the Special Master, but it
17 engages staff in the development of proposals in which they become invested, thus making
18 acceptance of "external" input more difficult. When such matters go to the Board for action and
19 approval is given, this signals to the community that something is about to be done and puts the
20 Plaintiffs and the Special Master in a position of undermining public confidence in the District
21 and/or in the USP.
22

23 The Court is not unaware of this problem and has consistently urged the parties and the
24 Special Master to work collaboratively. From time to time, the parties pledge to work together
25 more constructively and do so. But, this commitment is not consistently applied, and each time it
26 is not, the situation can be perceived by the Plaintiffs as a lack of goodwill on the part of the
27
28

CERTIFICATE OF SERVICE

I hereby certify that on, May 27, 2014, I electronically submitted the foregoing **NOTICE OF FILING BY SPECIAL MASTER OF REPORT AND RECOMMENDATIONS RELATING TO DIETZ NARA** for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

J. William Brammer, Jr.
wbrammer@rllaz.com

Oscar S. Lizardi
olizardi@rllaz.com

Michael J. Rusing
mrusing@rllaz.com

Patricia V. Waterkotte
pvictory@rllaz.com

Rubin Salter, Jr.
rsjr@aol.com

Kristian H. Salter
kristian.salter@azbar.org

Zoe Savitsky
Zoe.savitsky@usdoj.gov

Anurima Bhargava
Anurima.bhargava@usdoj.gov

Lois D. Thompson
lthompson@proskauer.com

Andrew H. Marks for
Dr. Willis D. Hawley,
Special Master